STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday June 10, 2005
(9:15 am - 5:00 pm)

VIDEO-CONFERENCE MEETING

SF-State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

LA-State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015

Members Present: In LA: Harry Sondheim (Chair); Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck and Tony Voogd. In SF: Linda Foy; JoElla Julien; Sean SeLegue; Kurt Melchior; Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; and Paul Vapnek. (All members were present.)

Also Present: Katie Allen (State Bar Staff); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison); Carol Buckner (Western State University); Kevin Mohr (Commission Consultant);Joseph Lundy (ALAS); Marie Moffat (State Bar General Counsel); Lauren McCurdy (State Bar Staff); Manuela Albuquerque (Berkeley City Attorney, League of California Cities); Michael Goodman (L.A. Alternate Public Defenders); Donald Baker (Latham & Watkins); Estela de Llanos (Latham & Watkins); Toby Rothchild (Access to Justice Commission Liaison); and Mary Yen (State Bar Staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE NOVEMBER 19, 2004, DECEMBER 10, 2004 AND APRIL 1-2, 2005, MEETINGS

The open session summary for the April 1-2, 2005 meeting was deemed approved. At the request of staff consideration of draft summaries for the November 19, 2004 and December 10, 2004 meetings was postponed. Regarding the April 1-2, 2005 meeting notes, a modification requested by Mrs. Julien was noted and implemented.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair summarized the Commission's status report presented on May 13, 2005 to the Board Committee on Regulation, Admissions and Discipline. It was indicated that the Board Committee did not object to the Commission's proposal to seek formal public comment in manageable batches, rather than as one large

comprehensive report. It was also indicated that the Board Committee was informed that the Commission's anticipated time-line for completion of its work would be at least one year longer than the original five year projection.

The Chair requested that comments on agenda items sent by e-mail be sent at least one week prior to the day of the meeting to allow adequate time for review and meeting preparation.

B. Staff's Report

Staff called attention to the summary of evaluation forms collected at the Annual Ethics Symposium and reported that the Commission's panel garnered the highest rating of all of panels that were presented during the day-long MCLE event that attracted over 100 attendees. Staff also reported that Mr Ruvolo's keynote speech at the Symposium was well received.

Staff reported on the status of Assembly Bill 1700 (re secret settlements) indicating that the bill was not passed on the Assembly floor and, as a result, will be treated as a 2-year bill to be brought up in the next legislative session.

Ms. Peck and Mr. Voogd reported on the Commission's preparation for its joint panel with the San Diego County Bar Association Ethics Committee for the 2005 State Bar Annual Meeting in San Diego. It was reported that the panel will cover rules 2-100, 3-600 and 1-400 and will be entitled "Cutting Edge Ethics Issues." Members planning to attend the Annual Meeting were encouraged to attend the panel and support the Commission's representatives.

III. MATTERS FOR ACTION

A. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

Matter carried over.

B. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

Ms. Peck presented a revised draft of proposed amended rule 2-400 that was submitted for the April 1&2, 2005 meeting. The draft included a proposal to number the rule as rule 9.1 and also included alternative formulations of proposed paragraph (A). Ms. Peck indicated that the primary policy issue presented is whether the rule should be expanded beyond the existing scope that is limited to employment discrimination and client retention. Specifically, guidance was sought on four possible options: (1) keep the existing scope of the rule; (2) expand the rule to cover more types of unlawful discrimination; (3) expand the rule to cover perpetrator as well as management; and (4) expand the rule to reach private conduct. The

Chair called for a discussion of the Commission member comments on the draft. Among the points raised during the discussion were the following.

(1) The comment should be modified to explain that legitimate advocacy is not limited by the rule (see MR 8.4 Cmt. [9]). For example, something along the lines of the litigation privilege concept could be added.

(2) Consideration should be given to addressing Wheeler/Batson motions with a modification of proposed Cmt. [7].

(3) The issue of expanding the scope of the rule may be restated as whether it is appropriate for this to address practice of law conduct or even private conduct that does not occur in connection with the operation and management of a law office.

(4) Consideration should be given to exploring whether any disciplinary complaints have been handled by the State Bar as there does not appear to be any published discipline cases.

(5) The current scope of the rule, in part, reflects the limited disciplinary resources of the State Bar and the fact that there are other regulatory enforcement mechanisms for addressing discrimination.

(6) There is a substantive problem with the current rule's requirement for an adjudicated finding of discrimination and that is that most employment discrimination claims are brought under FEHA and FEHA applies only to an employer which is usually the law firm, itself, and not an individual supervisor. As the State Bar only disciplines members not law firms, the practical result is that there will be few instances where the rule will be triggered.

(7) A key concern that would arise with an expansion of this rule is the possible overlap and confusion with the misconduct rule (proposed new rule 1-120X/8.4) that has been tentatively approved by the Commission.

(8) To avoid overlap and confusion, the relevant aspects of the misconduct rule could be modified and then moved into a standalone rule such as rule 9.2 so the lawyers could read the rules together.

Following discussion, the Chair called for consensus votes to guide the codrafters. Regarding the codrafters' proposal to expand the inherent framework of the existing rule to address discriminatory conduct beyond the operation of a law office, the vote revealed a slight majority not to expand the rule (5 yes, 6 no, 0 abstain). Regarding the codrafters' proposal to stay with the current framework but expand slightly to identify and cover additional types of discrimination occurring in the operation of a law office, the Commission agreed to pursue this limited expansion (9 yes, 2 no, 0 abstain). The codrafters were asked to prepare a redraft for the next meeting.

[Intended Hard Page Break]

C. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

Mr. Sapiro presented a February 23, 2005 memorandum submitted for the April 1&2, 2005 meeting. Two primary concepts were highlighted as requiring action by the Commission: (1) the sale of an "area of practice," geographic and substantive; and (2) sales made to multiple attorney purchasers. The Chair first called for a discussion of the concept of expanding the rule to permit the sale of an "area of practice." Among the points raised during the discussion were the following.

(1) The proposed expansion offers no clear public protection benefit but involves a meaningful risk that the practice of law will be further commercialized with business interests dominating professionalism.

(2) It is unknown whether the expansion to allow the sale of an area of practice will benefit solo/small practices or will be mainly used by large law firms.

(3) There is an intersection with RPC 2-200 that requires clarification. Currently, RPC 2-200 compliance may work for some circumstances that would be treated as a sale if the rule is expanded. The rule amendment should not become a mechanism to avoid RPC 2-200 protections.

(4) The origin of this rule is a policy decision to allow valuation of good will in the practice of law. In general, the law governing the valuation of good will and transfers involving good will and portions of good will have progressed beyond the restrictive parameters of the existing rule.

(5) If the rule is not expanded, then the circumstances that gave rise to the original public policy decision, namely pre-textual partnerships by solos, may manifest in the future in new forms of end runs around the rules. The Commission should be proactive in confronting prospective developments in the practice of law and crafting appropriate public protection parameters.

(6) Commercialization, itself, should not be regarded as an inherent evil. If the expansion affords options that keep lawyers in practice and clients are adequately protected, then the rule amendment should not be avoided simply because it could help lawyers in the business-side of practicing law.

Following discussion, consensus votes were taken. The Commission agreed that the rule should be changed beyond the limited terms of the status quo (6 yes, 5 no, 2 abstain). The Commission agreed that the codrafters should implement amendments to permit the sale of a substantive area of practice (6 yes, 5 no, 2 abstain). The Commission agreed that the codrafters should implement amendments to permit the sale of a geographic area of practice (7 yes, 6 no, 0 abstain).

The Chair next called for a discussion of the proposal to allow sales to multiple purchasers. It was noted that although client auctions should not be promoted, the essential issue was how far a lawyer should be allowed to go in dividing up a law practice in seeking to confer the client benefit of disparate expertise for various clients. On the proposal to allow sales

to multiple purchasers, the Chair took a consensus vote and the Commission agreed to expand the rule to allow such sales (8 yes, 5 no, 0 abstain).

Next, the codrafters sought guidance on the issue of a lawyer's "return to practice" after a sale of an area of practice. It was noted that sales of areas of practice could be abused as subterfuge for additional firm profit. However, there would be legitimate situations such as when a sick lawyer recovers and wants to return to full-time practice. On a proposal to allow some option for a return to practice, the Chair took a consensus vote and the Commission agreed to pursue the concept of allowing some option for a return to practice (8 yes, 3 no, 2 abstain). On a proposal that any option be made subject to terms and conditions to be developed by the codrafters, the Chair took a consensus vote and the Commission agreed that conditions should be imposed (9 yes, 1 no, 2 abstain). Lastly, the codrafters sought guidance on the issue of modifying the rule to govern sales by a "law firm" rather than just individual lawyers. In principle, the Commission agreed with the concept of governing sales by a "law firm" (6 yes, 3 no, 2 abstain). The codrafters were asked to prepare a revised draft rule for the next meeting.

[Intended Hard Page Break]

D. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

The Chair welcomed visitors attending the meeting on this rule and invited them to introduce themselves. The Chair indicated that comments from Commission members would be taken to start the discussion and followed by comments from visitors wishing to address the Commission. However, in the interest of time, the Chair emphasized that any comments already submitted in writing should not be repeated in oral remarks. Mr. Martinez summarized the prior consideration of this matter and presented the current revised draft rule containing minor changes to the draft included in the April 1&2, 2005 agenda materials. It was noted that various Commission member comments were pending consideration by the Commission and that the public officer exception in paragraph (C) has received several comments from interested persons. The Chair called for a discussion of the various comments submitted on matters not involving the public officer exception and the following drafting decisions were made.

To be consistent with RPC 3-600, the Commission agreed to use the term "organization" rather than "entity" throughout the rule (9 yes, 0 no, 3 abstain).

To streamline the rule text for clarity, the Commission agreed to delete (B)(2)(c) from the rule and adapt the language to be a part of Cmt. [9] (5 yes, 4 no, 2 abstain).

In response to concerns arising from the State Bar Court's decision in In *the Matter of Dale* (State Bar Ct. Rev. Dept. 2005) 2005 D.A.R. 5350, the Commission agreed with the following revision to paragraph (A) (7 yes, 3 no, 2 abstain):

> "(A) In representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a person the member knows to be represented by another lawyer in the matter or in a related matter which is the subject of the member's communication, unless the member has the consent of the other lawyer."

To address concerns that paragraph (B)(2)(a) and (B(2)(b) were confusing as to the "matter" and the "subject of the communication," the Commission agreed to modify (B)(2)(a) (6 yes, 3 no, 3 abstain) and to combine it with (B)(2)(b), effectively eliminating (B)(2)(b) as a standalone subparagraph (8 yes, 3 no, 1 abstain):

> *Revised (B)(2)(a)*
>
> ~~". . . if the subject matter of the communication is any act or omission of the employee, member, agent or constituent in connection with the matter that may be binding upon or imputed to the entity for purposes of civil or criminal liability."~~
> "… if the subject matter of the communication is any act or omission of the employee, member, agent or constituent in connection with the matter ~~[that may]~~, and if the communication may ~~could~~ be binding upon or imputed to the [entity] ~~[organization]~~ for purposes of civil or criminal liability."

Revised (B)(2)(a) combined with (B)(2)(b)

"(2) A current employee, member, agent or constituent of a corporation, partnership, association, or other private or public entity:

(a) if the subject matter of the communication is any act or omission of the employee, member, agent or constituent in connection with the matter, and if the communication may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the ~~entity~~ organization."

In addition to the above drafting changes, some members indicated that they had minor stylistic suggestions and the Chair asked that these changes be sent to the codrafters as soon as possible after the meeting and at the latest, two weeks before the next meeting. Also, the Chair asked Mr. Mohr and staff to include a note in the eventual web posting of the rule stating that class action issues are pending and would be separately considered.

Next, the Chair called for discussion of the public officer exception. The Chair began by inquiring whether any Commission member would be making a motion to defer discussion of the public officer exception as had been requested in at least one of the comments received from interested parties. A motion was made but received no second and none of the interested parties present spoke in favor of a deferral. Accordingly, the Chair proceeded with a discussion. Among the points raised during the discussion were the following.

(1) The existing exception reflects not only 1st Amendment concerns but also access to government standards present in the California Constitution, Article 1, Section 3.

(2) While access and petition issues have been asserted as the rationale for the exception, there appears to be no case law supporting this proposition and, in fact, there is at least one case that suggests a contrary view.

(3) As set forth in some of the comments from land use practitioners, generally administrative contacts with agencies and officials should not be frustrated by the ex parted contact rule and there is no dispute from government lawyers on this point.

(4) Consideration should be given to the approach used in N. Carolina and in the District of Columbia where the concept is one of notice and candor when dealing with a public official similar to the obligations imposed by MR 4.3. A notice approach would ameliorate the deception aspect of the ex parte contacts with public officials.

(5) Deception is not a primary concern of public lawyers. The abuse arises from the end run around the public lawyer that harms the public interest whenever a public official is placed in a position where damaging admissions, imprudent stipulations and bad settlement agreements can be made at the urging of a persuasive opposing counsel whose only loyalty is to their client plaintiff. A notice and candor approach likely would do little to curb this abuse.

(6) Notice is just a lesser form of required consent and it would nevertheless have the unacceptable impact of chilling the fundamental right to petition. Practically speaking,

politics often dictate that a public official would not want it known that they are entertaining private lobbying efforts and notice to anyone could effectively shut-down such lobbying.

(7) Despite the fact that a relevant matter is in litigation, land use practitioners need a standard that allows speaking in a public forum, as well as in private, in circumstances where there may be policy issues at stake. This is the understanding of the policy set by the existing rule.

(8) Public clients need the same protection afforded to private clients; however, a modified exception could be developed that allows discussion of pending litigation when a related policy issue is on the public agenda of a public forum meeting.

(9) If a non-lawyer party has an unqualified right to appear at an open session public meeting, then no rule should prohibit that party from retaining a lawyer to appear on their behalf as that would be a form of prior restraint.

(10) Using pending litigation as a trigger is an imperfect concept because "entitlement proceedings" often are contemporaneous with "litigation" and routine work with staff should not be chilled, especially where a city and an owner are on the same side during pending litigation.

(11) The draft offered in the public lawyer comment relies on state statutory law to define "pending litigation" and "government claim" and this is inherently inadequate with regards to federal practice and contact with federal agencies. The Commission must be careful to not be myopically focused on issues of state law practice.

In the course of the discussion several votes were taken but there was no consensus on any proposed approach. Among the proposals that did not garner majority support were the following.

(1) adopt the codrafters' version of the exception set forth in the agenda materials (2 yes, 9 no, 1 abstain).

(2) adopt a modified version of the proposal in the comment letter from Ms. Albuquerque (4 yes, 7 no, 2 abstain).

(3) maintain status quo of existing (C)(1) (6 yes, 7 no, 0 abstain).

(4) adopt MR 4.2 as a substitute for the entirety of RPC 2-100 (5 yes, 7 no, 1 abstain).

At the suggestion of the Chair, and with no objections from any member, further discussion of the public officer exception was deemed tabled. The Chair asked the interested parties in attendance to make an attempt to meet and collectively develop a compromise approach that could be considered by the drafting team.

[Intended Hard Page Break]

E. Consideration of Rule 1-300 [ABA MR 5.5] (Unauthorized Practice of Law; Multijurisdictional Practice of Law) (Including consideration of discussion section re "definition of the practice of law")

Matter carried over. Brief comments were made regarding: (1) the need to coordinate the consideration of similar language and concepts found in proposed rules 5.3 and 5.1; and (2) the issue of whether "partners" is an overbroad concept for this rule as many partners do not exercise managerial authority. The Chair indicated that the chapter 5 series of rules will all be considered at the July meeting.

[Intended Hard Page Break]

F. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

Ms. Foy reported on a subcommittee meeting with stakeholders held by video-conference on May 26, 2005. Based on the information obtained during the meeting, it was the sense of the subcommittee that any proposed RPC amendment would impact the duty of confidentiality and would require coordinated statutory amendments. The one option under consideration by the subcommittee that may not require a statutory change is the concept of an advance waiver/consent approach. A straw vote on the proposal that the Commission consider and develop statutory amendments to complement rule changes revealed a consensus that the subcommittee should be allowed to explore that approach (8 yes, 3 no, 2 abstain). It was understood that any legislative proposal would be coordinated with the State Bar Government Affairs Office and, through that office, with appropriate legislative and court staff.

[Intended Hard Page Break]

G. Preliminary Report on Rule 3-100. Confidential Information of a Client. [ABA MR 1.6].

Mr. Mohr orally reported his observations on the May 26, 2005 impaired client subcommittee and stakeholder meeting. The Chair indicated that the rule 3-100 team would assess the recent developments on the Commission's consideration of MR 1.14 and, in the future, would likely be given an assignment to provide a full rule study report. Rule 3-100 is a new rule but if the Commission's work on MR 1.14, or any other issue, generated concerns that rule 3-100 should be modified then the 3-100 team would address all such issues in a comprehensive, rather than piecemeal, manner. Ms. Peck was added to the drafting team as a cross-over member from the impaired client subcommittee.

[Intended Hard Page Break]

H. Consideration of Rule 3-200 [ABA MR 3.1 and 3.2]. Prohibited Objectives of Employment

Mr. Voogd presented a May 11, 2005 memorandum with a revised draft rule 3.1. Mr. Voogd reported that input from Mr. Kehr had been considered in developing the current draft. In response to Mr. Voogd's report, the following drafting decisions were made.

(1) The Commission agreed with Mr. Kehr's recommendation that the draft rule not specifically address Wende brief situations but instead include a new Cmt. [4] clarifying that the term "proceeding" includes appellate and writ proceedings (8 yes, 0 no, 2 abstain).

(2) The Commission agreed with Mr. Kehr's recommendation to reserve a place, possibly at the start of Cmt. [4], for a cross reference to MR 3.8 (re special duties of prosecutors), subject to the Commission's future action on MR 3.8 (8 yes, 0 no, 2 abstain).

(3) The Commission determined to use the ABA rule title: "Meritorious Claims and Contentions" (8 yes, 0 no, 2 abstain).

(4) The Commission agreed with the codrafters' recommended modification to Cmt. [1] identifying certain codified provisions as a cross reference (5 yes, 3 no, 0 abstain).

With these changes, the Commission tentatively approved proposed rule 3.1 (6 yes, 3 no, 0 abstain). The codrafters were asked to finalize the draft for submission to staff. The codrafters were also assigned to prepare a report on MR 1.3 re diligence, including consideration of the D.C. version of that rule. It was understood that the web posting of proposed rule 3.1 should go forward without awaiting the Commission's work on rules 3.2 and 1.3. Ms. Peck noted her objection to the Commission's tentative approval of rule 3.1.

[Intended Hard Page Break]

I. Consideration of Rule 2-200. Financial Arrangements Among Lawyers

Mr. Lamport presented draft 6 of proposed amended rule 2-200 (dated June 2, 2005). Mr. Lamport called attention to Mr. Kehr's comments (June 5, 2005 email) and recommended changes to paragraph (a)(2). The Chair deemed these changes to (a)(2) approved by consensus. The Chair called for a vote on draft 6 of proposed amended rule 2-200, as modified, and the rule was tentatively approved (5 yes, 3 no, 1 abstain). Mr. Lamport was asked to finalize the draft and submit it to staff for web posting. It was understood that 2-200(B) may be modified, moved or deleted, depending upon the Commission's ultimate action on rule 1-320(B).

[Intended Hard Page Break]

J. Consideration of ABA MR 5.7. Responsibilities Regarding Law-Related Services (no California counterpart)

Matter carried over.

K. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

Matter carried over.

[Intended Hard Page Break]

L. Consideration of Rule 3-320 Relationship with Other Party's Lawyer

Mr. Mohr presented a revised rule 3-320 (rule 1.8.3) dated April 9, 2005, noting that the draft included changes agreed upon at the Commission's April meeting (including: implementation of a knowledge requirement; and replacing "member" with "lawyer" throughout the rule). In response to Mr. Mohr's report, its was suggested that this rule be considered only in connection with other conflicts of interest rules and not treated as a stand-alone rule. A straw vote taken by the Chair revealed no consensus to follow that suggestion. The following drafting decisions were made.

(1) The Commission agreed with Mr. Kehr's recommended change (June 5, 2005 email) to clarify paragraph (A) to state: "A lawyer shall not represent a client in a matter if the lawyer knows that another party to the matter is represented by the lawyer's spouse. . ." (5 yes, 1no, 4 abstain).

(2) In Cmt. [1], the Commission replaced the phrase "partner or associate" with "in the same law firm" (8 yes, 1 no, 1 abstain). It was understood that consideration of "of counsel" would be deferred to the Commission's action on the definition of "law firm."

(3) The Commission deleted Cmt. [2] with the understanding that the rule 3-310 team would be making recommendations on the concept of imputed conflicts and vicarious disqualification (6 yes, 1 no, 3 abstain).

(4) The Commission authorized the codrafters to add a new comment (new Cmt. [2]) clarifying that the term "matter" includes both litigation and non-litigation matters (8 yes, 0 no, 2 abstain).

(5) In Cmt. [1], the Commission replaced the word "adverse" with the word "other" to track the language in the rule itself (9 yes, 0 no, 1 abstain).

With these changes, the Commission tentatively approved proposed rule 1.8.3 (9 yes, 2 no, 0 abstain). The codrafters were asked to finalize the draft for submission to staff. For the web posting, the Chair asked that a note be included stating the Commission is considering RPC 3-310 and the ABA conflicts rules and this may affect whether rule 1.8.3 remains a stand-alone rule.

[Intended Hard Page Break]

M. Consideration of Rule 1-100. Rules of Professional Conduct, in General

Matter carried over.